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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

ELVIS RUIZ, FRANCISCO JAVIER  
CASTRO and EDUARDO MARTINEZ,

No. 2:11-cv-3088-RMP

**PLAINTIFFS' REPLY  
STATEMENT OF FACTS IN  
SUPPORT OF THEIR MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT**

MAX FERNANDEZ and ANN  
FERNANDEZ, a marital community;  
and WESTERN RANGE  
ASSOCIATION, a foreign nonprofit  
organization,

## Defendants.

Plaintiffs submit this Reply Statement of Material Facts, in accordance with Local Rule 56.1(c), to address both Defendant Western Range Association (“WRA”)’s Response to Plaintiffs’ Statement of Facts (ECF No. 163) (hereafter “WRA Response to PSOF”) and Defendant Fernandez’ Response to Plaintiffs’

1 Statement of Material Facts (ECF No. 172), and set forth the facts which establish  
2 the absence of genuine issues of material fact relating to Plaintiffs' Motion for  
3 Partial Summary Judgment (ECF No. 140).

## **Uncontested Material Facts**

5 Plaintiffs' Statement of Facts, ECF No. 146 ("PSOF") Nos. 1-2, 51- 53,  
6 59-61, and 77-78 are undisputed by defendants and admitted without qualification.

7 Plaintiffs' Facts Nos. 4-10, 12-28, 31, 33-38, 44-48, , 63, 69-70, and 72-76  
8 are also undisputed by Defendants. While admitting each of these facts, however,  
9 WRA in many instances qualified the admission by noting that the facts admitted  
10 "do[] not establish the presence or absence of a fact germane to the dispute  
11 between the parties." In addition, with respect to facts drawn from documentary  
12 sources or U.S. Department of Labor regulations, WRA likewise admitted the facts  
13 but noted that the documents or regulations "speak for themselves." In none of  
14 these instances does WRA attempt to challenge the factual basis of any of  
15 Plaintiffs' assertions or to explain why they should not be considered by the Court.

16 Plaintiffs' Statement of Facts Nos. 77-83, 87, 89, 107, 109-113, 121-123  
17 are undisputed by Defendants.

**Plaintiffs' Assertions as to Which Defendants Fail to Raise Genuine Disputes of Material Fact**

**Plaintiffs' Fact No. 3:** WRA admits that it is a "joint employer" under the H-2A program, but by way of "caveat," argues that it is a joint employer only for

1 purposes of the H-2A program. The argument does not raise a genuine dispute as  
2 to Plaintiffs' factual assertion.

3           **Plaintiffs' Fact No. 11:** WRA denies that the statements of WRA economist  
4 Dr. James Holt support the finding of a joint employment relationship under the  
5 FLSA. However, WRA admits the accuracy of each such statement cited by  
6 plaintiffs, *see* PSOF ¶¶ at 12-20; WRA Response to PSOF at ¶¶6-7, and the legal  
7 effect of those facts is a question of law. *Bonnette v. California Health & Welfare*  
8 *Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). Thus, WRA's denial is insufficient  
9 to raise a genuine issue of material fact for trial.

10           **Plaintiffs' Fact No. 29:** WRA admits that its standard employment contract  
11 defines the terms and conditions of an H-2A herder's employment, with the  
12 qualification that it does so "only" to the extent required by the H-2A regulations.  
13 WRA Response to PSOF at ¶11. In qualifying this admission, however, WRA  
14 admits that it has control over the terms and conditions of Plaintiffs' employment  
15 as required of it under the H-2A regulations.

16           **Plaintiffs' Fact No. 30:** WRA admits all of the asserted facts relating to the  
17 form that its members fill out when requesting H-2A sheepherders from WRA, but  
18 adds that the form refers to the member as the "employer" and to WRA as the  
19 "agent." Since the label WRA uses for itself in the form does not determine  
20 whether WRA is an employer pursuant to the FLSA, WRA's Response does not

1 raise a genuine issue of material fact.

2           **Plaintiffs' Fact No. 31:** WRA admits that it engages recruitment  
3 coordinators to locate and recruit H-2A workers, but proffers the caveat that its  
4 recruitment coordinators are independent contractors rather than WRA employees.  
5 Nonetheless, WRA admits that these coordinators work for WRA and that WRA  
6 members have no connection with these coordinators. WRA Response to PSOF at  
7 ¶¶13-14. Thus, the proffered caveat raises no issue of material fact.

8           **Plaintiffs' Facts Nos. 39-41:** WRA admits that it arranges and pays for  
9 H-2A workers' transportation from Chile to the United States and back. WRA  
10 Response to PSOF at ¶17. That WRA may be reimbursed for these travel costs by  
11 its members does not lessen WRA's primary role in managing the transportation  
12 component of the H-2A program and does not raise an issue of material fact.

13           **Plaintiffs' Fact No. 42:** WRA admits that it requires H-2A sheepherders and  
14 WRA members to enter into a WRA standard form employment contract, but  
15 claims that it is not a party to the agreement. WRA Response to PSOF at ¶17.  
16 However, WRA admits that the agreement identifies the member as "a member of  
17 the Western Range Association"; provides that WRA may assign H-2A workers to  
18 members at its sole option; and obligates the WRA member to indemnify, defend,  
19 and hold harmless WRA in the event that an H-2A worker brings suit for unpaid  
20 wages. PSOF at ¶¶44-45, 49; WRA Response to PSOF at ¶¶20, 22. Moreover, the

1 agreement requires H-2A workers to notify WRA about any moneys a member  
2 owes the worker within a certain time or forfeit any claim against WRA. *See*  
3 Exhibit M to PSOF, ECF No. 146-14 at 189.

4           **Plaintiffs' Fact No. 43:** WRA admits that it provides members and workers  
5 with its standard form employment agreement containing terms and conditions  
6 required by WRA. However, WRA denies that it would not permit changes to be  
7 made to the terms and conditions, and asserts that it permits members to offer  
8 wages above those required by the H-2A regulations. First of all, WRA has  
9 admitted that it does not permit members to offer wages lower than those required  
10 by law. PSOF ¶51; WRA Response to PSOF at ¶24. More importantly, WRA  
11 Executive Director Richins testified that members cannot make changes to the  
12 contract. PSOF at ¶43. The fact that members can pay herders more money if they  
13 wish to does not contradict the undisputed fact that members must use the WRA-  
14 provided contract without changes.

15           **Plaintiffs' Fact No. 49:** WRA admits that its standard employment  
16 agreement contains an indemnification clause, but asserts that "Plaintiffs' [sic]  
17 offer no evidence that the indemnification provision was prepared in anticipation  
18 of litigation." WRA Response to PSOF at ¶22. However, the language of the  
19 clause explicitly anticipates litigation, in providing that the WRA rancher member  
20 "agrees to defend, indemnify, and hold [WRA] harmless *from any claim, demand,*  
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1       or lawsuit arising out of or related to the employment of the [H-2A] Employee,  
2       including but not limited to any claim by the [H-2A] Employee for wages or  
3       damages of any kind.” Exhibit M to PSOF, ECF No. 146-14 at 190.

4                   **Plaintiffs’ Fact No. 50:** WRA admits that WRA maintains a copy of each of  
5       its H-2A workers’ employment contracts, labor certifications, travel information,  
6       transfer records, as well as any complaints made by or about the worker. While all  
7       of these records are directly related to the workers’ employment, WRA claims that  
8       these records do not constitute “employment files.” Regardless of how WRA may  
9       wish to characterize the records, such characterization does not raise a genuine  
10      dispute of material fact as to consideration of the records in determining whether  
11      WRA employed Plaintiffs.

12                  **Plaintiffs’ Fact No. 62:** WRA admits that since 2005 it has transferred five  
13      sheepherders from Max Fernandez to other members. WRA’s caveat that “the  
14      employees were terminated by their employer prior to transfer by WRA” has no  
15      support in the record. The pages of Dennis Richins’ deposition testimony cited by  
16      WRA make no mention of the member “terminating” a herder prior to transfer;  
17      indeed, Mr. Richins admits that WRA can transfer a mistreated worker over the  
18      member’s opposition, and that the employment agreement gives WRA the power  
19      to transfer workers unilaterally. *See* Ex. A to WRA Response to PSOF, ECF No.  
20      162-1 at 5-6 (Richins Dep. 44:14-18; *id.* at 43:2-7). WRA’s proffered testimony of  
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1 Sarah Peters likewise provides no support for WRA's assertion. *See* Ex. B to  
2 WRA Response to PSOF, ECF No. 162-2 at 32-34 (Peters Dep. 119:25-121:9)  
3 (deponent "do[es] not know" whether WRA has the power to fire H-2A  
4 employees).

5           **Plaintiffs' Facts Nos. 63-68, 71:** WRA admits that it can transfer H-2A  
6 workers from one rancher member to another, in order to allow WRA to ensure  
7 compliance with the three-quarters work guarantee required under the H-2A  
8 regulations (PSOF at ¶64); as a way of resolving work placement problems that  
9 may arise between a worker and a rancher (PSOF at ¶65); to provide the worker  
10 with employment if the initial rancher no longer needed the worker or became  
11 dissatisfied with him (PSOF at ¶66); or to deal with situations in which a rancher  
12 mistreated a worker or violated terms of employment required by the DOL (PSOF  
13 at ¶¶67- 68). However, WRA asserts that it can transfer a herder only if a member  
14 first "terminates" the herder or if the member is violating his obligations under the  
15 H-2A program. WRA Response to PSOF at ¶¶33-36. Contrary to WRA's  
16 statement that the members terminate the herder before any transfer, (WRA  
17 Response to PSOF at ¶34) the member agreement that WRA cites for factual  
18 support actually states that "if a herder cannot be transferred, the herder remains in  
19 [the member's] employment until a transfer becomes available." ECF No. 146-10  
20 at 143. The member agreement makes no reference whatsoever to a member  
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1 having the authority to fire a sheepherder. *Id.* Indeed, WRA admits that WRA is a  
2 necessary party to any termination decision, and that individual rancher members  
3 *cannot* unilaterally terminate a herder's employment. PSOF at ¶¶ 18, 20, 69-71;  
4 WRA Response to PSOF at ¶¶6-7, 37. Thus, WRA's power to fire its H-2A  
5 employees is admitted and undisputed.

6           **Plaintiffs' Fact No. 71:** WRA denies Plaintiffs' assertion that individual  
7 members cannot terminate a worker's employment, and can only refer the worker  
8 to WRA for reassignment, to the extent that "terminate" is meant as the "legal  
9 termination of the employment relationship." Regardless of how WRA may wish  
10 to define termination, WRA's executive director admitted the truth of the assertion  
11 in his deposition: There, he was asked: "[Dr. James Holt] states [in his report]  
12 'Individual rancher members cannot terminate a herder's employment with the  
13 Western Range Association. It can only refer to herder to the association for  
14 reassignment.' Is that a true statement?" Mr. Richins replied: "Yes." He was then  
15 asked: "And it continues to be true today"? Again, Richins replied: "Yes." Ex. C  
16 to PSOF, ECF No. 146-04 at 101-02 (Richins Dep. 196:20-197:3).

17           **Facts Asserted by Defendants Fernandez Which Fail to Raise Genuine  
18 Disputes of Material Fact**

19           **Plaintiffs' Fact No. 82:** Defendants Fernandez contest this fact on the basis  
20 that the exact time that the sheep are brought back to the ranch and the exact time  
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1 that they are returned to pasture lands varies from year to year. However, the  
2 testimony of Max Fernandez that defendants relies rely upon in fact supports  
3 Plaintiffs' statement that the sheep are kept at the headquarters ranch from some  
4 time in December until after lambing is finished in April. Mr. Fernandez was  
5 asked, "Would it be accurate to say at some point in December the sheep would be  
6 moved to [the headquarters ranch]?" He answered, "Yeah." Exhibit 1 to WRA's  
7 Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment,  
8 ECF No. 175-1 (hereafter "Fernandez Dep." 33:17-20). He was asked again, "So  
9 from sometime in December until after the lambing, the sheep are on this property,  
10 the main ranch property?" He answered, "Yes, ma'am." *Id.* at 34:8-11, ECF No.  
11 175-1 at 12. Later in the deposition, Mr. Fernandez was asked when the sheep are  
12 taken off the main ranch property. *Id.* at 71:13, ECF No. 175-1 at 28. Mr.  
13 Fernandez testified that the sheep are generally moved in May. *Id.* at 73:7-15, ECF  
14 No. 175-1 at 30.

15       **Plaintiffs Facts Nos. 84-86:** Defendants Fernandez contest plaintiffs' facts  
16 84-86 because allegedly "plaintiff Martinez only performed Sheepherder tasks at  
17 the Fernandez Ranch." Fernandez Response to PSOF, ECF No. 172 at ¶3. The  
18 testimony relied upon was that Mr. Martinez would "[l]ook after the sheep. We  
19 feed the sheep and salt, repair corrals, if needed, and basically, you know, just be  
20 around there for anything happen [sic]." Fernandez Dep. 161:21-25, ECF No.175-

1 at 48. This testimony fails to raise a dispute of material fact because the  
2 testimony does not dispute that Mr. Martinez was working on the main ranch  
3 property the entire time that he worked for Defendants.

4           **Plaintiffs Facts Nos. 88, 90 and 91:** Defendants Fernandez contest these  
5 facts based on the same testimony quoted in Response to Plaintiffs' Facts No. 84-  
6 86. This testimony does not dispute the specific tasks that Mr. Martinez testified to  
7 performing at the ranch, other than denying that Mr. Martinez performed  
8 maintenance on the trucks and machinery. Furthermore, in later testimony, Mr.  
9 Fernandez admitted that Plaintiffs did work other than sheepherding, such as  
10 having helped build a corral on the ranch. Fernandez Dep. 93:19- 94:19, ECF No.  
11 175-1 at 39-40. Mr. Fernandez also testified that, in the wintertime, Plaintiffs  
12 helped feed the cows, Fernandez Dep. 28: 7-10, ECF No. 175-1 at 10, and that they  
13 may have helped with the calving. *Id.* at 70:16-20, ECF No. 175-1 at 27. Mr.  
14 Fernandez also testified that plaintiffs repaired fences. *Id.* at 67: 10-12, ECF No.  
15 175-1 at 24.

16           **Plaintiffs' Fact No. 91:** Defendants Fernandez deny that plaintiff Martinez  
17 was under "constant" supervision based on the term "constant" being vague.  
18 However, defendants provide no evidence to dispute Mr. Martinez' testimony,  
19 which was that "during my entire employment at Fernandez Ranch I worked under  
20 the constant supervision of Max Fernandez" and that "[Mr. Fernandez] was in

1 frequent contact with me and the other sheepherders throughout the workday and  
2 knew at all times what work we were doing.” Martinez Decl. at ¶8, ECF No. 143  
3 at 2. This testimony is self-explanatory and undisputed.

4           **Plaintiffs Facts Nos. 92-98:** Defendants dispute the facts relating to  
5 plaintiff Elvis Ruiz’s work at the ranch from August 2007 until April 2009, stating  
6 generally that “plaintiff Ruiz performed sheepherder tasks as set forth above.”  
7 Fernandez Response to PSOF at ¶5. However, Defendants fail to raise a question  
8 of material fact because the testimony they rely upon does not contradict Mr. Ruiz’  
9 testimony that he worked more than six months per year at the main headquarters  
10 ranch or taking the sheep to pastures close to the ranch, returning with the sheep to  
11 the ranch each evening, and sleeping at the headquarters ranch. *Id.*, ECF No. 172.  
12 Thus, Mr. Fernandez fails to raise a dispute of fact that Mr. Ruiz was not  
13 “principally engaged” in “range production of livestock.” Indeed, Mr. Fernandez  
14 admits that only one sheepherder at a time is needed to watch the sheep on the  
15 range. *See* Fernandez Response to PSOF, ECF No. 172 (failing to dispute PSOF  
16 ¶107). It is Mr. Fernandez’ testimony that the other worker, called the “tender,”  
17 brings the camper food and supplies and helps him move from position to position.  
18 Fernandez Dep. 17:6-10; *id.* at 74:4-13. This “tender” does not herd sheep. Even  
19 under Mr. Fernandez’ version of the facts, therefore, each of the plaintiffs spent the  
20 five-month period from April or May through September, when the other  
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1 sheepherder was caring for the sheep off the ranch, not engaged in sheepherding.  
2 Furthermore, much of the testimony relied upon to dispute Plaintiffs' facts consists  
3 of broad, conclusory statements that fail to dispute Mr. Ruiz' testimony as to the  
4 specific jobs that he performed, such as repairing fences, chopping firewood and  
5 taking it to Mr. Fernandez' house, or feeding the animals at the ranch. *See*  
6 Fernandez Dep. 65:14- 66:2, ECF No. 175-1 at 22-23. This conclusory testimony  
7 that there was "nothing to do" other than feed the sheep all winter is contradicted  
8 by Mr. Fernandez' testimony elsewhere in the deposition that the sheepherders  
9 would also feed the cows, repaired fences, and even built a corral. *See* discussion  
10 re Plaintiffs' Facts No. 88, 90 and 91, above.

11           **Plaintiffs' Facts No. 99-106:** Defendants' contentions relating to Mr. Ruiz'  
12 and Francisco Castro's work at Fernandez Ranch fail to raise a material dispute of  
13 fact and are not supported by the evidence cited.

14           Defendants fail to raise a material dispute of fact, because, even under Mr.  
15 Fernandez' version of events, Plaintiffs were not principally engaged in range  
16 sheepherding. Contrary to Defendants' Response, Mr. Fernandez' testimony does  
17 not conflict with Plaintiffs' Fact No. 99 ("from the time that Francisco Castro took  
18 the sheep away from the ranch in late April 2009, until he returned to the ranch  
19 five months later in September 2009, Elvis Ruiz had no responsibilities for the  
20 sheep at all") or Plaintiffs' Fact No. 100 ("Elvis Ruiz did not work as a range

1 sheepherder at all in 2009.”). The only dispute of fact—namely whether (as Mr.  
2 Ruiz testifies) Mr. Ruiz cut hay, worked on the tractor, repaired fences, and cared  
3 for cows and horses during this time, or whether (as Mr. Fernandez testifies) Mr.  
4 Ruiz brought food and supplies to Mr. Castro, cared for dogs, and brought  
5 replacement horses to Mr. Castro—is immaterial. Either, way Mr. Ruiz was not  
6 engaged in range sheepherding. *See* Fernandez Dep. 74:4-13; *id.* at 78:4-9, ECF  
7 No. 175-1 at 31,34.

8 With regard to Plaintiffs’ Fact No. 102, asserting that Mr. Castro both built a  
9 fence on property across the road from the main ranch and helped construct a large  
10 hay storage structure in 2008, Mr. Fernandez’ testimony in both cases was that he  
11 “didn’t know” whether Mr. Castro had performed such work. Shown a picture of a  
12 fence on property across the road from his main ranch property, Mr. Fernandez  
13 was asked whether Mr. Castro built that fence. Mr. Fernandez responded three  
14 times, “I don’t know.” Fernandez Dep. 91: 22-24; *id.* at 92:13-18; ECF No. 175-1  
15 at 37-38. Asked whether any of the Plaintiffs worked on the hay barn, Mr.  
16 Fernandez testified, “I don’t think so, ma’am. I don’t know...” Fernandez Dep.  
17 88: 20-23, ECF No. 175-1 at 36. Finally, asked whether Plaintiffs had built a  
18 corral on his property, Mr. Fernandez admitted that a plaintiff worked on the corral  
19 in 2008 or 2009, but he could not recall whether it was Mr. Castro or Mr. Ruiz.  
20 Fernandez Dep. 93:12- 94:19. The testimony of Mr. Fernandez that he did not  
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1 know whether or not plaintiffs had done the work is insufficient to raise a genuine  
2 dispute of fact.

3 Defendants fail to provide any factual basis for disputing Plaintiffs' Facts  
4 No. 103, 104, 105, or 106.

5 **Plaintiffs' Fact No. 108:** Contrary to Fernandez' Response to PSOF at ¶7,  
6 Mr. Fernandez' deposition testimony supports Plaintiffs' contention that he had a  
7 total of 300-500 sheep. Mr. Fernandez' deposition testimony, cited by defendants,  
8 claiming that he might have between 800-1200 sheep, was contradicted later in the  
9 deposition, when Mr. Fernandez testified that "you can tell the amount of sheep  
10 that I did have, by the number of sheep that they had been sold." Ex. I, Fernandez  
11 Dep. 58: 8-9. In 2009, Mr. Fernandez sold 340 lambs and testified that he would  
12 have had about the same number of sheep that year. *Id.* at 58:12-19. Later, Mr.  
13 Fernandez testified that in 2009 that he could have had between 340 and 380  
14 sheep, because up to 10% of the sheep may not have given birth that year. *Id.* at  
15 60: 9-10, ECF No. 175-1 at 18. Based on this methodology, Mr. Fernandez would  
16 have had between 448 and 500 sheep in 2008, *id.* at 60:18-24, and between 327 and  
17 360 sheep in 2010. Ex. W. to PSOF (Receipt), ECF No. 146-24 at 266. Fernandez  
18 testified that he did not know how many sheep he had in 2007, in which he sold  
19 141 lambs. Fernandez Dep. 62:6-9.

20 **Plaintiffs' Fact No. 114:** Contrary to Defendants' assertion that Mr. Ruiz  
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1 visited Mr. Castro, when the latter was tending the sheep, “daily,” Mr. Fernandez  
2 testified that he did not know how often Mr. Ruiz visited Mr. Castro. Asked  
3 whether it was every day, Mr. Fernandez replied, “Well, sometimes, if he need to,  
4 yeah. I don’t been keeping track of that.” Fernandez Dep. 74:24- 75:4. Nor does  
5 the testimony does not support Defendants’ assertion that Mr. Ruiz performed no  
6 work around the ranch. Asked whether Mr. Ruiz had any jobs at the ranch, Mr.  
7 Fernandez responded, “probably feeding the dogs, feeding the horses...To tell you  
8 the truth, I don’t know.” *Id.* at 78:4-12.

9           **Plaintiffs Facts No. 115-120:** Defendants do not provide any evidence to  
10 dispute Plaintiffs’ statements regarding the U.S. Department of Labor Special  
11 Procedures for Sheepherders. Despite Defendants’ response that these facts  
12 constitute “interpretations,” Defendants do not identify facts in the record  
13 supporting their position.

14           **Plaintiffs’ Response to WRA’s Additional Facts**

15           **WRA Additional Facts Nos. 48, 50, 51:** Plaintiffs object that WRA’s  
16 additional facts numbers 48, 50 and 51 rely upon the findings of a DOL  
17 investigator that are inadmissible hearsay. As explained in detail in Plaintiffs’  
18 Memorandum in Opposition to Fernandez’ Motion for Summary Judgment (ECF  
19 No. 166 at 2-8), the DOL investigator’s report is untrustworthy and therefore  
20 inadmissible. The specific statements in the report relied on by defendants were

1 made by third parties and are independently inadmissible as hearsay-within-  
2 hearsay. Finally, the report's legal conclusions cannot be considered by the Court  
3 in the context of a summary judgment motion. *Id.* at 8.

4           **WRA Additional Fact No. 49:** The statement cited simply makes explicit  
5 the limited scope of the Special Procedures, which do not address the question of  
6 joint employment outside the context of the H-2A program.

7           **WRA Additional Fact No. 55:** WRA's assertion that it does not hire H-2A  
8 workers is flatly contradicted by the record. *See* discussion re Plaintiffs' Fact 62,  
9 above. The deposition testimony cited by WRA, ECF No. 162-1 at 9-10 (Richins  
10 Dep. 77, 117) provides no evidence on this point.

11           **WRA Additional Fact No. 56:** Plaintiffs admit that WRA's pre-  
12 employment agreement states that WRA is not the H-2A worker's employer, but  
13 this fact is of no legal significance. *See* discussion re Plaintiffs' Fact 30, above.

14           **WRA Additional Fact No. 57:** Mr. Richins' subjective understanding of  
15 how a particular clause made its way into WRA's standard form contract *drafted*  
16 *solely by his organization* is irrelevant as a matter of law. *See Hearst Commc'ns,*  
17 *Inc. v. Seattle Times*, 154 Wn.2d 493, 504 (2005) (when construing contracts,  
18 Washington courts "do not interpret what was intended to be written but what was  
19 written.")

20           **WRA Additional Fact No. 60:** Plaintiffs dispute WRA's statement that "the

1 member will terminate the employee, and then WRA can transfer him,” because  
2 WRA is a necessary party to any termination decision. *See* discussion re Plaintiffs’  
3 Facts 63-68 and 71, above.

4           **WRA Additional Fact No. 62:** Contrary to Defendants’ assertion that WRA  
5 did not hire the sheepherders, all of the evidence shows that WRA did in fact hire  
6 them. Defendants cite no factual basis for their assertion that WRA did not hire  
7 the sheepherders that the WRA admits it recruited, transported, and assigned to  
8 specific member ranches. The deposition testimony cited by WRA provides no  
9 evidence on this point. Ex. III, Peters Dep. 115-118; Ex. II, Richins Dep. at 148.  
10 (Plaintiffs have attached the testimony as it was not included in WRA  
11 materials). WRA admits that its “recruitment coordinators” recruited Plaintiffs for  
12 H-2A employment. PSOF at ¶¶31, 33-34; WRA Response to PSOF at ¶¶14-15.  
13 WRA does not contest the fact that WRA’s members have no connection with  
14 WRA’s recruitment coordinators. PSOF ¶32. WRA admits that it offered  
15 employment to recruited workers, brought them into the United States, and decided  
16 where, among all of WRA’s members in need of workers, a particular worker  
17 would be assigned. PSOF at ¶¶35-38, 45; WRA Response to PSOF at ¶¶15-17, 20.  
18 Nowhere in the record has WRA pointed to any evidence of any involvement of its  
19 rancher members in the hiring of the Plaintiffs. Indeed, nowhere in the record does  
20 WRA point to any evidence that anyone other than WRA hired the Plaintiffs.

1 PSOF ¶¶ 31-45.

2           **WRA Additional Fact No. 68:** WRA’s assertion that it cannot prevent a  
3 member from firing a worker is flatly contradicted by the testimony by WRA  
4 executive director Dennis Richins that WRA must be a party to any termination  
5 decision. *See* discussion re Plaintiffs Facts 63-68 and 71, above.

6           **WRA Additional Fact No. 70:** Plaintiffs dispute WRA’s assertion that,  
7 while herders may contact WRA if a problem arises, “WRA will not intervene  
8 between the member and the worker if there is such a problem, but will simply  
9 transfer the worker if both parties desire it.” This assertion lacks any factual  
10 support. To the contrary, WRA’s executive director admitted that if a member  
11 fails to pay the right wage, WRA has the ability to make the member pay the  
12 proper wage. Ex. II, Richins Dep. 44:24–45:4. On one occasion where a WRA  
13 member in Idaho failed to pay his H-2A workers properly, WRA’s director went to  
14 Idaho himself, paid the workers, brought the workers back with him, and  
15 terminated the member. Ex. II Richins Dep. 199:24-200:3.

16           **WRA Additional Fact No. 72:** Contrary to WRA’s response, WRA has  
17 taken on important responsibilities in ensuring that the workers actually receive  
18 their legally required wages. PSOF at ¶¶51; WRA Response to PSOF at ¶24.  
19 WRA’s executive director admitted that if a member fails to pay the right wage,  
20 WRA has the ability to make the member pay the proper wage. Richins Dep.

1 44:24 – 45:4 . On one occasion where a WRA member in Idaho failed to pay his  
2 H-2A workers properly, WRA’s director went to Idaho himself, paid the workers,  
3 brought the workers back with him, and terminated the member. Richins Dep.  
4 199:24-200:3 . If a herder should find himself without work for part of the H-2A  
5 visa period, WRA would pay the worker’s wages. Richins Dep. 48:6-21.  
6 Furthermore, Plaintiffs object to WRA’s reliance upon the DOL investigator’s  
7 unsubstantiated assertions, which constitute inadmissible hearsay. *See* discussion  
8 re Plaintiffs’ Reply to WRA Additional Facts Nos. 48, 50, and 51, above.

9           **WRA Additional Fact No. 73:** Plaintiffs dispute WRA’s assertion that the  
10 employment records kept by WRA about each of its H-2A employees “have  
11 nothing to do with the worker’s actual employment with the members.” To the  
12 contrary, WRA’s “herder files” contain any complaints made by or concerning a  
13 sheepherder regarding the work being performed. PSOF at ¶50. Moreover, the  
14 herder files indicate where other documents, such as payroll records, may be  
15 found. WRA Response Memo at 17. *See also* discussion re Plaintiffs’ Fact No. 50,  
16 above.

17  
18 RESPECTFULLY SUBMITTED this 28th day of January, 2013.

1 NORTHWEST JUSTICE PROJECT

2 /s/ Michele Besso  
3 Michele Besso, WSBA #17423

4 FARMWORKER JUSTICE

5 By: /s/ Weeun Wang  
6 Weeun Wang

7 Attorneys for Plaintiffs

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1                   CERTIFICATE OF SERVICE

2       I hereby certify that on January 28<sup>th</sup>, 2013, I caused the foregoing document  
3       to be electronically filed with the Clerk of the Court using the CM/ECF system and  
4       caused it to be served by mail to the following:

5

6       John Barhoum: [jbarhoum@dunncarney.com](mailto:jbarhoum@dunncarney.com)

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9       Weeun Wang: [wwang@farmworkerjustice.org](mailto:wwang@farmworkerjustice.org)

10      John Jay Carroll: [jcarroll@vhlegal.com](mailto:jcarroll@vhlegal.com)

11

12      DATED this 28<sup>th</sup> day of January, 2013.

13      By: /s/ Alex Galarza

14            Alex Galarza, Legal Assistant for  
15            Michele Besso, WSBA #17423  
16            Attorney for Plaintiffs  
17            Northwest Justice Project